

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES
OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, January 26, 2007
(9:15 am - 5:00 pm)

Saturday, January 27, 2007
(9:00 am - 5:00 pm)

State Bar Office
1149 South Hill Street, Room 723
Los Angeles, CA 90015

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Ellen Peck; Hon. Ignazio Ruvolo; Sean SeLegue; Dominique Snyder; Mark Tuft; Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: Kurt Melchior; and Jerry Sapiro.

ALSO PRESENT: Starr Babcock (State Bar staff); Saul Bercovitch (State Bar staff); Stan Bissey (California Judges Association); Prof. Carole Buckner (COPRAC/Western State)[Saturday]; Michael Carbone (California Dispute Resolution Council); Steve Cerveris (State Bar ADR Committee); Randall Difuntorum (State Bar Staff); Hon. Daniel Hanlon (California Judges Association ADR Committee); Hon. James Herman (California Judges Association)[by telephone]; Judy Johnson (State Bar Executive Director); Diane Karpman (Beverly Hills Bar Association Liaison)[Saturday]; Mimi Lee (State Bar Staff); Meg Lodise (Trust & Estates Section Executive Committee Liaison); Hon. Gregory O'Brien (ADR Services); Lauren McCurdy (State Bar staff); Hon. Michael Marcus (ADR Services); Howard Miller (State Bar Board of Governors); Marie Moffat (State Bar General Counsel); Prof. Kevin Mohr (Commission Consultant); Hon. Michael Nott (Judicate West); Toby Rothschild (Access to Justice Commission & LACBA Liaison)[Saturday]; Devallis Rutledge (Los Angeles District Attorneys Office)[Saturday]; Becky Stretch (ABA Center on Professional Responsibility)[by telephone]; Jay Welsh (JAMS); Kimberly Wong (Los Angeles Public Defenders Office)[Saturday]; and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE OCTOBER 6, 2006 AND DECEMBER 1, 2006 MEETINGS

The October 6, 2006 action summary was deemed approved. Consideration of the December 1, 2006 summary was postponed to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reminded members to: (1) make an effort to respond to issues posed in e-mails as such issues often require only a "yes" or "no" reply; (2) refrain from sidebar conversations during meetings so that the person who has the floor is the only one speaking; and (3) raise your hand to be recognized by the Chair so that all members and visitors have a fair opportunity to speak.

B. Staff's Report

There was no staff report.

III. MATTERS FOR ACTION - INITIAL CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT (BATCH 1)

A. CONSENT - Proposed Rule 7.1 [Rule 1-400]. Communications Concerning the Availability of Legal Services

This matter was designated as a "consent" agenda item and called for discussion by the Chair to discuss only those issues timely raised in response to the codrafters' January 8, 2007 report and recommendations on the public comment received on proposed Rule 7.1. The codrafters' language changes that were not the subject of a timely raised comment were deemed approved pursuant to the Commission's consent agenda procedure. The issues discussed and implemented were the following.

(1) The Commission considered the issue of addressing internet blogs in Rule 7.1 and a motion was made to do so but it failed for want of a second. It was observed that internet blogs are simply a modern fact pattern to which the rule can be applied and, as such, blogs do not require special treatment by the rule.

(2) In paragraph (c)(3), and as a global stylistic matter throughout all of the rules, the Commission agreed to change "which" to "that" where the clause is a restrictive, as opposed to nonrestrictive, clause (8 yes, 0 no, 1 abstain).

With the foregoing changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

B. CONSENT - Proposed Rule 7.2 [Rule 1-400]. Advertising

This matter was designated as a “consent” agenda item and called for discussion by the Chair to discuss only those issues timely raised in response to the codrafters’ January 8, 2007 report and recommendations on the public comment received on proposed Rule 7.2. The codrafters’ language changes that were not the subject of a timely raised comment were deemed approved pursuant to the Commission’s consent agenda procedure.

The only issue discussed was whether to use the approach of indicating “RESERVED” comments to make the numbering of comments in the Commission’s proposed new California rules track the numbering of comparable comments in the ABA Model Rules. As a global matter, the Commission determined to not use “RESERVED” comments (10 yes, 0 no, 0 abstain). As a consequence of this decision, the “RESERVED” Comment [1] was deleted and the remaining comments were renumbered.

With this one change, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

C. CONSENT - Proposed Rule 7.3 [Rule 1-400]. Direct Contact with Prospective Clients

This matter was designated as a “consent” agenda item and called for discussion by the Chair to discuss only those issues timely raised in response to the codrafters’ January 8, 2007 report and recommendations on the public comment received on proposed Rule 7.3. The codrafters’ language changes that were not the subject of a timely raised comment were deemed approved pursuant to the Commission’s consent agenda procedure. The issues discussed and implemented were the following.

(1) In paragraph (a), the work “live” was added to clarify the type of telephone contact contemplated by the rule (10 yes, 0 no, 2 abstain). It was understood that the codrafters would review the comments and make any necessary conforming changes.

(2) At the end of Cmt. [4], the Commission added the last sentence of MR 7.3 Cmt. [4] (10 yes, 1 no, 0 abstain).

(3) In Cmt. [6] and [8], the Commission added the term “bona fide” to describe both group/prepaid legal plans and public benefit/charitable organizations (7 yes, 5 no, 0 abstain). It was understood that the codrafters would do further research to ascertain why the ABA does not use the term “bona fide.”

With the foregoing changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

D. CONSENT - Proposed Rule 7.4 [Rule 1-400]. Communication of Fields of Practice and Specialization

This matter was designated as a “consent” agenda item and called for discussion by the Chair to discuss only those issues timely raised in response to the codrafters’ January 8, 2007 report and recommendations on the public comment received on proposed Rule 7.4. The codrafters’ language changes that were not the subject of a timely raised comment were deemed approved pursuant to the Commission’s consent agenda procedure. The issues discussed and implemented were the following.

(1) In paragraph (d), the Commission decided to revert back to the original public comment version rather than making the change requested by one of the public comments received (9 yes, 0 no, 1 abstain).

(2) In paragraph (d)(1), the Commission modified the language to read: “the lawyer ~~holds a current certificate~~ is certified as a specialist ~~issued~~ by the Board of Legal Specialization, . . .” (8 yes, 2 no, 1 abstain).

With the foregoing changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

E. CONSENT - Proposed Rule 7.5 [Rule 1-400]. Firm Names and Letterheads

This matter was designated as a “consent” agenda item to be called for discussion by the Chair only if issues were timely raised in response to the codrafters’ January 8, 2007 report and recommendations on the public comment received on proposed Rule 7.5. As there were no issues raised, the rule was deemed completed and approved for informal submission to the Supreme Court.

[Intended Hard Page Break]

F. CONSENT - Proposed Rule 1.2.1 [Rule 3-210]. Scope of Representation

This matter was designated as a “consent” agenda item and called for discussion by the Chair to discuss only those issues timely raised in response to the codrafters’ January 8, 2007 report and recommendations on the public comment received on proposed Rule 1.2.1. The codrafters’ language changes that were not the subject of a timely raised comment were deemed approved pursuant to the Commission’s consent agenda procedure. The issues discussed and implemented were the following.

(1) To respond to an issue raised concerning a lawyer’s ability to counsel clients concerning violations of law regardless of whether the lawyer reasonably believes that the particular law is invalid, the Commission modified the rule to read:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal, except when the lawyer believes in good faith that the law, rule, or ruling is invalid. In all cases, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.” (5 yes, 4 no, 4 abstain).

(2) After the action taken above, the Commission further modified the rule to be split into two paragraphs with the second paragraph (paragraph (b)) starting with the phrase “Notwithstanding paragraph (a)...” (7 yes, 3 no, 2 abstain). The Commission also adopted by consensus a non-substantive change to use the phrase “shall not counsel or assist” in the place of the current language. With these changes, the revised reads:

Rule 1.2.1 Counseling or Assisting the Violation of Law

- (a) A lawyer shall not counsel or assist a client to engage, ~~or assist a client,~~ in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal, except when the lawyer believes in good faith that the law, rule, or ruling is invalid.
- (b) ~~In all cases,~~ Notwithstanding paragraph (a), a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.

(3) The Commission deleted Cmt. [2] as unnecessary and potentially confusing (5 yes, 4 no, 2 abstain).

With the foregoing changes, the rule was deemed completed and approved for informal submission to the Supreme Court. Prior to submission to staff, it was understood that the codrafters would audit the entire rule and comments to make any necessary conforming changes.

[Intended Hard Page Break]

G. Proposed Rule 2.4.2 [Rule 1-700]. Member as Candidate for Judicial Office

The codrafters did not recommend any changes in response to the public comments received. The Chair announced that there were no objections to deeming this rule approved for informal submission to the Supreme Court.

[Intended Hard Page Break]

H. Proposed Rule 2.4.1 [Rule 1-710]. Member as Temporary Judge, Referee, or Court-Appointed Arbitrator

The codrafters did not recommend any changes in response to the public comments received. The Chair announced that there were no objections to deeming this rule approved for informal submission to the Supreme Court.

[Intended Hard Page Break]

I. Proposed Rule 2.4 [Rule 1-720]. Member as Third Party Neutral

The Commission considered a January 16, 2007 report and recommendations on the public comment received on proposed Rule 2.4. The Chair welcomed the following visitors who were present for the discussion of this rule: Starr Babcock (State Bar staff); Saul Bercovitch (State Bar staff); Stan Bissey (California Judges Association); Michael Carbone (California Dispute Resolution Council); Steve Cerveris (State Bar ADR Committee); Hon. Daniel Hanlon (California Judges Association ADR Committee); Hon. James Herman (California Judges Association); Hon. Gregory O'Brien (ADR Services); Hon. Michael Marcus (ADR Services); Hon. Michael Nott (Judicate West); and Jay Welsh (JAMS). With the input of the visitors, the Commission discussed three issues: (1) whether the rule should regulate fees charged in the private ADR context; (2) whether the rule should contain an exception to accommodate federal preemption concerns; and (3) whether the rule should be structured to incorporate by reference ADR standards developed by the Judicial Council. After discussion, the following drafting decisions were made.

(1) The Commission authorized the codrafters to add rule language (not simply comment language) clearly stating that the fee standard only applies when a third party neutral is performing a court-connected activity and does not apply in any other setting (11 yes, 0 no, 1 abstain).

(2) The Commission authorized the codrafters to add language in the comments expressly excepting from the rule any activities governed by NASD standards (10 yes, 0 no, 1 abstain). It was understood that the codrafters would start with the language specifically covering SEC preemption but could broaden the language to deal with all potential areas of federal preemption.

(3) There was a consensus that the Commission should continue to develop a rule in this area and should not abandon it all together (11 yes, 1 no, 0 abstain).

(4) There was a consensus that the rule should include the substance of paragraphs (a) and (b) which is the equivalent of MR 2.4 (11 yes, 1 no, 0 abstain). Ms. Peck asked that her "no" vote be recorded as a general objection to the regulation of lawyer ancillary business activities, especially ADR activities.

(5) Upon motion made and seconded, the Commission tabled the discussion of paragraphs (c) and (d) (7 yes, 5 no, 0 abstain). However, a straw vote was taken to ascertain the sense of the Commission on the proposed deletion of these paragraphs. The straw vote did not show a strong consensus to delete all of paragraphs (c) and (d) (3 yes, 9 no, 0 abstain). Another straw vote was taken and showed some support for a proposal to simply cross reference the Judicial Council standards in the comments (6 yes, 4 no, 3 abstain).

The Chair asked the codrafters to implement the Commission's decisions on the regulation of fees and preemption. The codrafters indicated that multiple versions of the rule will be prepared for the next meeting including: (1) a version that tracks MR 2.4; (2) a version that codifies standards in the rule itself; and (3) a version that uses the structure of Board adopted standards similar to the standards that accompany the trust account rule and advertising rule.

[Intended Hard Page Break]

J. Proposed Rule 1.1 [Rule 3-110]. Competence

The Commission considered a January 10, 2007 report and recommendations on the public comment received on proposed Rule 1.1. The Commission discussed whether the rule should cover promptness and diligence. The Commission also discussed whether a lawyer should be subject to discipline for a failure to supervise subordinate lawyers and nonlawyers under both Rule 1.1 and Rules 5.1, 5.2, and 5.3. After discussion, the following drafting decisions were made.

(1) There was no objection to the codrafters' proposed approach of moving the concept of supervision out of Rule 1.1 and into the relevant parts of Rules 5.1, 5.2, and 5.3. It was understood that the codrafters of these rules would coordinate their drafting on this matter, including the continued inclusion of the duty to supervise case citations.

(2) The Commission directed the codrafters to clarify in the comments, possibly by merging Cmt. [1] and [2], that "promptness" is part of diligence (8 yes, 0 no, 4 abstain). It was understood that the new comment would indicate that the "promptness" obligation applies to the performance of a client's objectives and desired goals and thus allows for strategic delays consistent with the client's objectives.

(3) The Commission deleted Cmt. [6] and replaced it with the following: "This Rule addresses only a lawyer's disciplinary responsibility for his or her own professional competence. See Rules 5.1(b) and 5.3 (b) with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers." (8 yes, 3 no, 0 abstain).

The Chair asked the Rule 1.1 codrafters to implement all of the changes in a revised draft. The Chair asked the Rules 5.1, 5.2, and 5.3 codrafters to specifically consider appropriate cross references back to Rule 1.1 on the issue of supervision.

[Intended Hard Page Break]

K. Proposed Rule 1.5.1 [Rule 2-200]. Financial Arrangements Among Lawyers

The Commission considered e-mails from Mrs. Julien; Mr. Lamport and Mr. Sapiro responding to the public comment received on proposed Rule 1.5.1. The Commission discussed three issues: (1) the requirement that client consent be obtained at the time of an agreement to divide a fee; (2) the propriety of advanced consent that identifies potential lawyers with whom a fee might be divided; and (3) whether the rule should expressly state that both lawyers who divide a fee have an obligation to obtain the client's consent but that consent obtained by one of the lawyers satisfies the rule.

After discussion, the Chair called for motions or recommendations to modify the rule but no motions or recommendations were made. Accordingly, the Chair stated that the public comment version of the rule, especially as it pertained to the issues discussed, was deemed approved for informal submission to the Supreme Court. In addition, there was no objection to deeming accepted the non-substantive changes in Mr. Sapiro's January 7, 2007 e-mail enumerated as items 1, 2, 4, and 5. Item 3 was not accepted following objection from Mr. Lamport. Prior to submission of a final version to staff, it was understood that the codrafters could audit the entire rule and comments to make any necessary conforming changes.

[Intended Hard Page Break]

L. Proposed Rule 5.3.1 [Rule 1-311]. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

The Commission considered a January 10, 2007 recommendation from Mr. Voogd responding to the public comment received on proposed Rule 5.3.1. Mr. Voogd recommended that the public comment version of the rule be approved without any changes. However, Mr. Voogd also suggested that the Commission discuss whether the rule should include the requirement that the State Bar make public the compliance reports submitted by lawyers pursuant to the rule. Following discussion, the Commission replaced the third sentence of paragraph (d) of the rule with the following: "The State Bar may make such notices available to the public." (6 yes, 1 no, 3 abstain). The intent of this change was to clarify that the rule permitted, but did not require, the State Bar to treat the compliance reports as a public record. Thus, the rule would empower the Board to resolve this issue as an operational policy matter. With this change, there were no objections to deeming this rule approved for informal submission to the Supreme Court.

[Intended Hard Page Break]

M. Proposed Rule 5.5 [Rule 1-300]. Unauthorized Practice of Law

The Commission considered a January 12, 2007 codrafter's report and recommendations on the public comment received on proposed Rule 5.5. There was no objection to deeming approved the recommendations of the codrafters subject to discussion of the issues raised by Mr. Sapiro in his January 22, 2007 e-mail. After discussion, the following drafting decisions were made.

(1) The Commission considered whether to restore Cmt. [3] through Cmt. [7], which describe activities constituting the practice of law, but there was insufficient support to make this change (2 yes, 10 no, 0 abstain).

(2) The Commission considered whether to add a new paragraph (b)(1) included by the codrafters in response to a public comment received from the San Diego County Bar Association but there was no consensus to make this change (5 yes, 5 no, 0 abstain).

(3) The Commission retained the original paragraph (b)(1) in the form that it was distributed for public comment (7 yes, 4 no, 0 abstain). Thus, the new paragraph (b)(1) was rejected.

(4) The Commission considered the option to add language to address "ghost-writing" but no motion was made for any actual proposal.

With the foregoing changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to submit a final version to staff.

[Intended Hard Page Break]

N. Proposed Rule 5.6 [Rule 1-500]. Agreements Restricting a Member's Practice

The Commission considered a January 9, 2007 codrafter's report and recommendations on the public comment received on proposed Rule 5.6. The Commission discussed two issues: (1) whether the rule should include a generalized exception for reasonable anti-competition agreements or one that is precisely limited to the exception found in *Howard v. Babcock*; and (2) whether the rule should include a comment clarifying that the common practice of hiring lawyers to conflict them out of a case is not a violation of the rule. In addition, it was noted that RPC 1-500(B) is not included in Rule 5.6 because it was moved to Rule 8.3. After discussion, the following drafting decisions were made.

(1) The Commission considered a proposed generalized exception along the lines of the following: "Notwithstanding paragraph (a), a lawyer may offer, participate in offering, and enter into an agreement with other law firm members that imposes a reasonable cost on former members who compete with the law firm in a limited geographic area. . ." but there was insufficient support to adopt this approach (3 yes, 7 no, 1 abstain).

(2) The Commission considered a motion to use the language suggested in the public comment received from Katten Muchin Rosenman ("KMR") but this motion did not garner a second and no vote was taken.

(3) The Commission agreed that the best approach would be for the codrafters to consider the KMR concerns and develop a redraft that would not necessarily be the exact language proposed by KMR (8 yes, 1 no, 3 abstain).

(4) Regarding the practice of clients hiring lawyers to conflict them out of a case, Ms. Peck volunteered to assist the codrafters in developing a new comment. It was understood that the new comment would be intended to address the issue as raised by the public comment received from the Los Angeles County Bar Association.

A redraft was requested for the next meeting.

[Intended Hard Page Break]

O. Proposed Rule 8.3 [Rule 1-500(B)]. Reporting Professional Misconduct

The codrafter's report recommended two non-substantive, clarifying changes in response to the public comments received. The Chair announced that there were no objections to deeming the rule, as revised by the codrafters, approved for informal submission to the Supreme Court.

[Intended Hard Page Break]

P. Proposed Rule 8.4 [Rule 1-120X]. Misconduct (Includes Rule 1-120 Assisting, Soliciting, or Inducing Violations)

The Commission considered a January 11, 2007 codrafter's report and recommendations on the public comment received on proposed Rule 8.4. The Commission discussed two issues: (1) whether to delete or modify paragraph (d) and (e) because the standard of "prejudicial to the administration of justice" is too vague; and (2) whether the concept of misrepresentation in paragraph (c) should be modified. After discussion, the following drafting decisions were made.

(1) The Commission considered a proposal to delete all of paragraph (d) rather than trying to fix the "prejudicial to the administration of justice" standard but there was insufficient support to make this change (4 yes, 6 no, 1 abstain). After this vote, the Commission agreed to let the codrafters attempt a redraft of paragraph (d) that takes into consideration all the concerns that have been raised.

(2) The Commission considered a proposal to delete all of paragraph (e) and Cmt.[6] but there was insufficient support to make this change (3 yes, 6 no, 2 abstain). It was understood that the codrafters have the option of redrafting paragraph (e) and Cmt.[6].

(3) To clarify the concept of misrepresentation in paragraph (c), the Commission added the word "intentional" so that the rule would be triggered by "intentional misrepresentation" and not negligent misrepresentation (5 yes, 3 no, 2 abstain).

The codrafters were asked to implement the foregoing changes in a revised draft for consideration at the next meeting. Members with input on the redrafting of paragraph (d), in particular an alternative to the standard of "prejudicial to the administration of justice" were encouraged to send an e-mail to the codrafters.

[Intended Hard Page Break]

Q. Proposed Rule 1.0.1. Law Firm Definition

The Commission considered a January 11, 2007 report and recommendations on the public comment received on proposed Rule 1.0.1. The Chair indicated that the only issue raised in response to the codrafter's report was the issue of including "of counsel" attorneys within the definition of a law firm. Mr. Tuft noted that the term "of counsel" is used in many different factual contexts and that it may not be appropriate to categorically dictate that an "of counsel" will always be within the Commission's definition of a law firm. Mr. Lamport observed that the Commission's approach to RPC 2-200 amendments (proposed Rule 1.5) has been to deflect the issue of the application of that rule to an "of counsel" by using the defined term "law firm." The Commission agreed to let Mr. Tuft and Mr. Lamport coordinate their work and so that a redraft of Rule 1.0.1 can be considered at the next meeting that has the benefit of Mr. Lamport's concerns about the impact of the definition on Rule 1.5.

[Intended Hard Page Break]

R. Proposed Rule 1.0 [Rule 1-100]. Rules of Professional Conduct, in General

The Commission considered a January 11, 2007 report and recommendations on the public comment received on proposed Rule 1.0. The Commission discussed the reference to ethics opinions in Cmt.[3] and the option of going back to the original RPC 1-100 language regarding the use of the rules in non-disciplinary contexts. After discussion, the following drafting decisions were made.

(1) In the third sentence of Cmt.[3] the word “issued” was added to modify “opinions of ethics committees” to avoid possible confusion between opinions that have actually been issued and those which have only been published for the limited purpose of soliciting public comment and have not been finalized (8 yes, 1 no, 2 abstain).

(2) In response to a public comment from the Orange County Bar Association, the Commission considered the option of going back to the original RPC 1-100 language regarding the use of the rules in non-disciplinary contexts but no motion was made in favor of this change.

(3) In paragraph (c), the Commission made the following non-substantive, stylistic change (6 yes, 3 no, 2 abstain):

(c) Comments: The comments following the Rules do not add obligations to the Rules but provide guidance for ~~interpreting their interpretation~~ and ~~practicing for acting~~ in compliance with the Rules.

With the foregoing changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to submit a final version to staff.

[Intended Hard Page Break]

S. Consideration of Rule 3-500 and Rule 3-510 [ABA MR 1.4] Communication; Communication of Settlement Offer

The Commission considered a January 11, 2007 report and recommendations on the public comment received on proposed Rule 1.4. The Commission discussed possible changes in response to the public comment in: Cmt. [1] (re citation of Bus. & Prof. Code sec. 6068(m) and (n)); Cmt.[2] (re guidance on significant developments); Cmt.[4] (re communications in class actions); and Cmt.[6] (re a client's standing instructions concerning settlement offers). After discussion, the following drafting decisions were made.

(1) The Commission deleted all of Cmt.[1] because it may mislead lawyers into thinking that the standards in Rule 1.4 are identical to the communication duty in the State Bar Act (6 yes, 3 no, 2 abstain).

(2) The Commission considered modifying Cmt.[2] to revise the guidance offered on what constitutes a significant development but there was insufficient support to make any change (2 yes, 10 no, 0 abstain). A subsequent vote showed a consensus for keeping Cmt.[2] as drafted (9 yes, 3 no, 0 abstain).

(3) In Cmt.[4], the Commission considered the Los Angeles County Bar Association's recommendation concerning class action communications but no motion was made in support of this recommendation.

(4) The Commission revised Cmt.[6] to replace the phrase "the proposal" with "such an offer" (9 yes, 1 no, 1 abstain) and to replace the word "indicated" with "instructed" (6 yes, 5 no, 0 abstain).

With the foregoing changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to submit a final version to staff.

[Intended Hard Page Break]

IV. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES REDRAFTED FOLLOWING PUBLIC COMMENT (BATCH 1)

A. Proposed Rule 1.8.10 [Rule 3-120]. Sexual Relations With Client

The Commission considered a revised draft of proposed Rule 1.8.10 (Draft #3, dated 01/2007). The revised draft changed the public comment version of the rule from the narrow standard of existing RPC 3-120 to the broader standard of MR 1.8(j). Justice Ruvolo led a discussion of the revised rule and the issues raised in messages from Ms. Foy, Mr. Kehr, Mr. Lamport, and Ms. Peck. The following drafting decisions were made during the discussion.

(1) To track the ABA standard that does not apply imputation of conflicts arising from sexual relations with clients, the Commission deleted all of paragraph (b) (6 yes, 0 no, 4 abstain).

(2) On the issue of vicarious exposure, a straw vote to ascertain the sense of the Commission indicated some support for imposing discipline on a lawyer who takes no action despite having knowledge about another lawyers sexual relations with the firm's client (8 yes, 2 no, 1 abstain).

(3) To simplify the explanation of paragraph (a), Cmt.[3] was revised to read (6 yes, 2 no, 3 abstain):

“This Rule is not intended to apply to sexual relations between lawyers and ~~their spouses or persons in an equivalent domestic relationship, or~~ applicable to ongoing consensual sexual relations which predate the initiation of the lawyer client relationship: ~~because issues~~ issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship.”

(4) There was no objection to reversing the order of Cmt.[2] and Cmt.[3]. It was understood that this order tracks the order of comments to MR 1.8.

The Chair asked the codrafters to implement all of the changes in a revised draft for consideration at the next meeting.

[Intended Hard Page Break]

B. Proposed Rule 5.1 [Rule 1-310X]. Responsibilities of Partners, Managers, and Supervisory Lawyers

The Commission considered a revised draft of proposed Rule 5.1 (Draft #6, dated 1/11/07) and an accompanying report and recommendations from Mr. Tuft. There was no objection to the Chair deeming approved Mr. Tuft's recommendations that were not the subject of a timely comment from a Commission member. Recommendations that did garner comments from Commission members included: concerns about Constitutional vagueness; the use of the phrase "comparable managerial authority;" and the potential for implied California endorsement of ABA Formal Op. No. 06-441. Mr. Tuft led a discussion of these issues and the revised draft. The following drafting decisions were made during the discussion.

(1) In Cmt.[3], the Commission asked the codrafters to use separate sentences to address the related, yet distinct, concepts of "reasonable efforts" and "adequate measures" (6 yes, 0 no, 2 abstain).

(2) In Cmt.[4], by consensus the Commission agreed to add a reference to the State Bar's Indigent Defense Guidelines and to revise the second sentence to read: ". . . workload among lawyers in a law firm including, for example. . . ."

(3) In Cmt.[5], by consensus the Commission agreed to delete the opening reference to paragraph (b) so that the entire comment addresses only paragraph (a) (so as to read: "Paragraph (a) is also intended to apply. . . .").

(4) The codrafters volunteered to audit the entire rule and comment to ascertain whether the various references to "in a law firm" should be clarified to extend to lawyers who are outside of the firm but nevertheless under the supervision of firm managers.

(5) There was no objection to deeming approved the following rewrite of the first line of paragraph (c)(2): ". . . the lawyer is a partner, or individually or together with other lawyers possesses comparable managerial authority, in the law firm in. . . ."

(6) To avoid the creation of a new, unintended standard of "indirect responsibility," Cmt.[8] was revised to read: "Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact. A lawyer in charge of a particular client matter has direct supervisory authority over the work of other lawyers engaged in the matter." (7 yes, 0 no, 0 abstain).

The Chair asked the codrafters to implement all of the changes in a revised draft for consideration at the next meeting.

[Intended Hard Page Break]

C. Proposed Rule 5.2 [Rule 1-310X]. Responsibilities of Subordinate Lawyer

This matter was carried over by the Chair in recognition of the fact that resolution of this rule was dependent upon the Commission's action in response to the public comments received on proposed Rule 5.1. It was understood that both Rule 5.2 and Rule 5.3 would be handled only after there has been adequate consideration of possible changes to Rule 5.1.

[Intended Hard Page Break]

D. Proposed Rule 5.3 [Rule 1-300]. Nonlawyer Assistants

This matter was carried over by the Chair in recognition of the fact that resolution of this rule was dependent upon the Commission's action in response to the public comments received on proposed Rule 5.1. It was understood that both Rule 5.2 and Rule 5.3 would be handled only after there has been adequate consideration of possible changes to Rule 5.1.

[Intended Hard Page Break]

V. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 2OR BATCH 3 RULES)

A. Consideration of Rule 1.8.1 [Rule 3-300]. Avoiding Interests Adverse to a Client

The Commission considered a revised draft of proposed Rule 1.8.1 (Draft #6.1, dated 1/15/07). The issues raised by the revised draft included: whether changes to a fee agreement during the pendency of an attorney-client relationship trigger the rule; and whether the rule should require that a client be advised about the “pros and cons” of a transaction. Mr. Lamport led a discussion of these issues and the revised draft. The following drafting decisions were made during the discussion.

(1) The Commission considered a recommendation for a new comment stating that the rule is not intended to apply to a modification of a fee agreement unless it grants an adverse pecuniary interest, but there was insufficient support to make this change (6 yes, 6 no, 2 abstain).

(2) As a concept, there was agreement (9 yes, 1 no, 0 abstain) to adopt a comment in some rule, including potentially in Rule 1.8.1, essentially stating that a duty arises only if a fee agreement change conveys a material advantage on the lawyer or gives rise to an adverse pecuniary interest (or some other similar test that would exclude the situation where a lawyer might lower fees or alter payment provisions to help the client). It was understood that a fee increase that complies with terms of original fee agreement would not be a material advantage.

(3) There was no objection to moving Cmt.[6] up to follow Cmt.[1] as both comments address the overall scope of the rule.

(4) Regarding the issue of whether the rule should require that a client be advised about the “pros and cons” of a transaction, the Commission considered a recommendation to adopt the concept that such advice should be required by Rule 1.8.1, but there was insufficient support for this change (3 yes, 7 no, 1 abstain). It was observed that this is a longstanding proposition in California case law (*Felton v. Le Breton* (1891) 92 Cal. 457).

(5) The codrafters agreed to consider whether there should be a definition of a contingent fee for this rule or as a global defined term.

(6) The Commission considered a recommendation to delete all of Cmt.[12] (regarding imputation) but there was insufficient support to make this change (3 yes, 3 no, 2 abstain).

The codrafters were asked to implement the foregoing changes in a revised draft for consideration at the next meeting.

[Intended Hard Page Break]

B. Consideration of Rule 3-600 [ABA MR 1.13] (Organization as Client)

The Commission considered a revised draft of proposed Rule 1.13 (Draft #6.2, dated 1/15/07). Mr. Lamport led a discussion of the issues raised by the codrafter's footnotes. The following drafting decisions were made during the discussion.

(1) In paragraph (g), there was no objection to deeming approved the cross references (including the reference to the aggregate settlement rule) added by the codrafters for purposes of guidance.

(2) In Cmt.[2], the Commission retained the first sentence as drafted (6 yes, 0 no, 0 abstain). It was understood that the purpose of the comment is to clarify what is meant by the "highest" authorized officer in paragraph (a). Regarding the codrafter's proposed second sentence of Cmt.[2], there was no motion to accept that addition and the Chair deemed it rejected.

(3) In Cmt.[3], the Commission retained the first sentence as drafted (5 yes, 0 no, 1 abstain). Also, the second sentence was deleted (3 yes, 1 no, 1 abstain). Regarding the third sentence it was modified to delete the phrase at the end that states: "provided the lawyer complies with paragraph (f)."

(4) Regarding Cmt.[4], the codrafters agreed to review it to determine whether it should be combined with Cmt.[7].

(5) A motion was made to delete all of Cmt.[4a] but that motion was withdrawn to allow the codrafters to revise it to more precisely state the concept that deliberate ignorance of client misconduct is not acceptable but, at the same time, there is no general duty to investigate a client organization's activities that are outside the scope of the lawyer's representation.

(6) In Cmt.[5], the phrase "to the client" was deleted from the first sentence (5 yes, 1 no, 0 abstain).

The codrafters were asked to implement the foregoing changes in a revised draft for consideration at the next meeting.

[Intended Hard Page Break]

C. Consideration of Rule 2-100 [ABA MR 4.2] Communication With a Represented Party

The Commission considered a January 11, 2007 memorandum from Mr. Tuft providing background information on the ABA's 1995 "party to person" change in MR 4.2. The Commission also considered a revised draft of proposed amended RPC 2-100 (Draft# 11.1, dated 1/20/07). The Chair welcomed the following visitors who were present for the discussion of this rule: Devallis Rutledge (Los Angeles District Attorneys Office); and Kimberly Wong (Los Angeles Public Defenders Office). With the input of the visitors, the Commission discussed the comments received by the Commission that oppose the "party to person" change, including comments from the California Attorney General and Los Angeles District Attorney Steven Cooley (the letter from Steven Cooley was hand distributed at the meeting by State Bar staff).

In the course of the discussion, some Commission members indicated that the visitors' concerns with the "party to person" change could be adequately handled by a comment. Other Commission members indicated a preference for abandoning the change in light of the opposing views of the stakeholders and dealing with the impact of the *Dale* case by adding a comment limiting that case to its facts. The Chair did not call for a vote to resolve the Commission's different views because the codrafters agreed to try another attempt at developing consensus comment language that would mitigate the concerns about the "party to person" change. The codrafters were asked to post any consensus drafts of possible comment language to the RRC E-list as soon as possible to allow stakeholders as much time as possible to consider the language and prepare a response.

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D. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

Matter carried over.

[Intended Hard Page Break]

E. Consideration of Rule 3-100 [ABA MR 1.6 & 1.8(b)] Confidential Information of a Client

Matter carried over.

[Intended Hard Page Break]

F. Consideration of Rule 4-210 [ABA MR 1.8(e)] Payment of Personal or Business Expenses Incurred by or for a Client

Matter carried over.

[Intended Hard Page Break]

G. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14].

The Commission considered a revised draft of proposed Rule 1.14 (Draft #9, dated 11/17/06). The Chair welcomed Meg Lodise (Trust & Estates Section Executive Committee) who was present for the Commission's discussion of this rule. With the exception of issues concerning Cmt.[9] and some stylistic changes, there were no objections to the Chair deeming adopted all of the recommendations of the codrafters. Ms. Peck led a discussion of the issues raised in Cmt.[9]. The following drafting decisions were made during the discussion.

(1) By consensus, the codrafters were authorized to merge Cmt.[9] with Cmt.[4] to clarify the steps required prior to a lawyer's permitted disclosure of confidential information. It was understood that the codrafters could consider using the 10-day ballot procedure to finalize the comments.

(2) To complement Cmt.[9], the Commission authorized the codrafters to add a new comment stating that a member is not subject to discipline regardless of whether or not the member elects to exercise their right of permissible disclosure (9 yes, 2 no, 0 abstain). It was understood that the codrafters would use the language in RPC 3-100 and Business & Professions Code 6068, subdivision (e)(1) and (e)(2). It was also understood that the codrafters could refine the rule language to more closely track the wording of RPC 3-100 such as by using the phrase: "may, but is not required. . . ."

(3) In Cmt.[2] and [3], there was no objection to deeming adopted the stylistic change of replacing the word "could" with the phrase "is likely to."

The Chair asked the codrafters to implement the changes and then work with the Commission consultant and staff to prepare a mail ballot. In addition, the Chair thanked Ms. Lodise and asked her to convey the Commission's appreciation to the Trust and Estates Section and to Peter Stern for the assistance provided on this rule.

[Intended Hard Page Break]

H. Consideration of Rule 4-200 [ABA MR 1.5] Fees for Legal Services

Matter carried over.

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